

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DENNIS P. BOWLING,

Petitioner,

vs.

ROBERT J. HERNANDEZ,

Respondent.

CASE NO. 06 cv 2477 H

**ORDER ADOPTING
REPORT AND
RECOMMENDATION AND
DENYING RESPONDENT'S
MOTION TO DISMISS**

Dennis P. Bowling filed a pro se Petition for Writ of Habeas Corpus on November 9, 2006 under 28 U.S.C. §2254. He alleges that the denial of parole at his twelfth¹ hearing deprived Petitioner of due process and equal protection of the law. (Petition, at 6.) Respondent filed a motion to dismiss alleging the Petition was untimely under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. §2244(d), and did not allege a federal question. (Document 10-2, at 3-4.) Petitioner filed a response on March 13, 2007. (Document 14-2, at 6.)

The Magistrate Judge issued a Report and Recommendation to deny the motion. (Civ. No. 06 CV 2477.) The deadline for objections was June 11, 2007, and as of the date of this order Respondent has not filed any objections. This Court adopts the Report and Recommendation and denies Respondent's motion to dismiss Petitioner's claim.

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¹ Petitioner claims to challenge his thirteenth parole hearing, but the chronological history from the California Department of Corrections (Document 10-2, at 12-15) shows that the December 22, 2004 hearing was Bowling's twelfth, not thirteenth, hearing.

1 **Procedural History**

2 A San Diego County jury found Petitioner guilty of first degree murder in 1977.
3 (Doc. 10-2, at 7.) He received a life prison sentence. (Id., 10.) Petitioner appealed his
4 conviction and simultaneously filed a habeas petition challenging his sentence. This
5 Court denied that petition on May 26, 2004.² Petitioner now challenges his 2004 denial
6 of parole in a Petition for Writ of Habeas Corpus filed on November 9, 2006.³ (Pet'r's
7 Mem. of P.&A., at 16.)

8 Petitioner's first denial of parole came on December 14, 1982, his second on
9 February 2, 1984, and his twelfth on December 22, 2004. (Document 10-2, at 12-15.)
10 Bowling filed a habeas petition in Superior Court on April 24, 2005 challenging the
11 Board's action at the 2004 hearing. (Document 10-3, at 2, 56.) The Superior Court
12 denied it on June 29, 2005. (Document 10-4, at 2-4.) Petitioner filed a notice of appeal
13 on August 10, 2005. (Id., at 7, 18.) The Court of Appeal denied the petition on
14 September 20, 2005. (Id., at 50.) Petitioner filed a petition for review in the California
15 Supreme Court (Document 10-5, at 2, 40), which it denied on September 13, 2006 (Id.,
16 at 46). Bowling filed a Petition for Writ of Habeas Corpus with this Court on
17 November 9, 2006. (Petition, at 8.)

18 **STANDARD OF REVIEW**

19 This Court "may accept, reject, or modify, in whole or in part, the findings or
20 recommendations made by the magistrate judge." (28. U.S.C. §636(b)(1).) The Court
21 reviews de novo the Magistrate Judge's conclusions of law. Britt v. Simi Valley Unified
22 School District, 708 F.2d 452, 454 (9th Cir. 1983), overruled on other grounds by
23 United States v. Reyna-Tapia, 328 F.3d 1114, 1121-1122 (9th Cir. 2003). This Court
24 may dismiss a petition for Writ of Habeas Corpus "[i]f it plainly appears from the face
25 of the petition and any exhibits annexed to it that the petitioner is not entitled to
26

27 ² See Case No. 03 cv 332 IEG (NLS). Bowling alleged his sentence violated the Ex Post Facto
28 Clause and his Eighth and Fourteenth Amendment rights.

³ The date filed is the date on which Petitioner signed the Petition, and delivered
it to prison officers, under Lott v. Mueller, 304 F.3d 918, 921 (9th Cir. 2002).

1 relief...” Williams v. Kullman, 722 F.2d 1048, 1050 (2nd Cir. 1983). Petitioners pro
 2 se have a general lack of experience, so “courts should review habeas petitions [in these
 3 cases] with a lenient eye, allowing borderline cases to proceed.” Id.

4 **Timeliness**

5 The Antiterrorism and Effective Death Penalty Act (AEDPA) sets a one-year
 6 statute of limitations for non-capital habeas claims originating from state court
 7 proceedings.

8
 9 “A one-year period of limitation shall apply to an application for a writ
 10 of habeas corpus by a person in custody pursuant to the judgment of a
 11 State court. The limitation period shall run from the latest of—(D) the
 12 date on which the factual predicate of the claim or claims presented
 13 could have been discovered through the exercise of due diligence.” 28
 14 U.S.C. §2244(d)(1).

15
 16 “The time during which a properly filed application for State post-
 17 conviction or other collateral review with respect to the pertinent
 18 judgment or claim is pending shall not be counted toward any period of
 19 limitation under this subsection.” 28 U.S.C. §2244(d)(2).

20
 21 The date of a factual predicate is when Petitioner could have learned of the
 22 factual basis for his claims through the exercise of due diligence. Redd v. McGrath, 343
 23 F.3d 1077, 1082 (9th Cir. 2003). Petitioner argues in his reply brief that “this case arises
 24 as a challenge to the denial of Petitioner’s parole for the 13th time [in 2004].”
 25 (Document 14-2, at 1). Likewise, the Report and Recommendation to deny
 26 Respondent’s motion to dismiss “does not construe the Petition as challenging the
 27 second parole hearing” and finds that “Petitioner’s argument that the Board exceeded
 28 its authority after the first parole hearing can be taken to mean that it exceeded its

1 authority at any of the subsequent hearings, not only at the second hearing.” (Report
2 and Recommendation, at 3-4).

3 Petitioner’s due process and equal protection claims that the Board improperly
4 denied parole at his twelfth hearing are timely.⁴ The factual predicate for these claims
5 formed as early as the Board’s denial of parole on December 22, 2004. Petitioner
6 contends the Board’s decision became final on April 20, 2005, and that he was unsure
7 of the denial until then. (Document 14-2, at 4.) In any case, Bowling filed a habeas
8 petition on April 24, 2005 challenging the Board’s action in the Superior Court, well
9 within five months of the establishment of the factual predicate for his
10 claims.(Document 10-3, at 2, 56.) The time during which a petition for habeas corpus
11 is pending in state court does not count toward the statute of limitations under AEDPA.
12 28 U.S.C. §2244(d)(2); Redd, 343 F.3d at 1083. Petitioner did not exhaust alternatives
13 in the California courts until the California Supreme Court denied his petition on
14 September 13, 2006. (Document 10-5, at 46.) Under Rule 24 of the California Rules of
15 Court, renumbered 8.264 in 2007, a decision of the Supreme Court is not final until 30
16 days after filing “and therefore is subject to further action during that time.” Bunney v.
17 Mitchell, 262 F.3d 973, 974 (9th Cir. 2001). Consequently, the limitations period
18 resumed on October 14, 2006. Petitioner filed for habeas relief in this Court on
19 November 9, 2006. (Petition, at 8.) Therefore, Petitioner filed for habeas relief in this
20 Court within approximately five months of the establishment of the factual predicate
21 of his claim, meeting the one-year requirement of 28 U.S.C. §2244(d)(1)(D).
22 Petitioner’s due process and equal protection claims as to the Board’s denial of parole
23 at Petitioner’s 2004 hearing are therefore timely.

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28 ⁴ To the extent Petitioner challenges the Board’s actions at the 1984 hearing, his challenge is untimely under 28 U.S.C. §2244(d)(1)(D).

1 **Federal Claims**

2 Petitioner's due process and equal protection claims as to the denial of parole at
3 his twelfth hearing are timely. Therefore, this Court must determine whether these
4 claims allege a federal question.

5 Petitioner must allege a violation of the United States Constitution or a violation
6 of controlling precedent to win habeas relief. Estelle v. McGuire, 502 U.S. 62, 67-68
7 (1991). Respondent alleges Petitioner argues the Board misinterpreted California Penal
8 Code section 3041(b), which is not a federal question upon which this Court may grant
9 habeas relief. (Document 10-2, at 4.) It is well settled that habeas relief is unavailable
10 for allegations of state law violations. 28 U.S.C. §2254(a); Engle v. Isaac, 456 U.S. 107,
11 119 (1982).

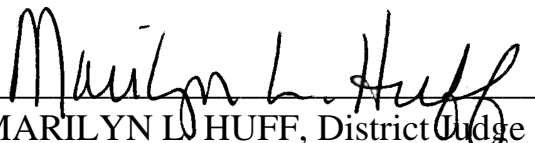
12 Petitioner's due process and equal protection claims concerning the denial of
13 parole at his twelfth hearing are proper before this Court. Estelle, 502 U.S. at 67-68;
14 Rose v. Hodges, 423 U.S. 19, 21 (1975).

15 **CONCLUSION**

16 For the above stated reasons, the Court ADOPTS the Magistrate Judge's Report
17 and Recommendation and DENIES Respondent's motion to dismiss Petitioner's due
18 process and equal protection claims that the Board improperly denied parole at
19 Petitioner's twelfth hearing in 2004. Accordingly, Respondent shall file an answer to
20 the Petition by July 31, 2007. Petitioner shall file any traverse by August 31, 2007.

21
22 IT IS SO ORDERED

23 Dated: June 26, 2007

24 
25 MARILYN L. HUFF, District Judge
26 UNITED STATES DISTRICT COURT

27 COPIES TO:

28 ** Magistrate Judge Nita L. Stormes

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